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IN THE

Supreme Court of the United States

October Term, 1945. No. 365

SEAS SHIPPING CO., INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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IN THE

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October Term, 1945.

No.

SEAS SHIPPING CO., INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Seas Shipping Co., Inc., respectfully prays for a writ of certiorari to review a final order of the United States Circuit Court of Appeals for the Third Circuit which reversed the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the Petitioner, and entered judgment against the Petitioner and Bethlehem Sparrows Point Shipyard, Inc. and Bethlehem Steel Company, Third Party Defendants, for $9,500.00 for damages on account of personal injury sustained by the Respondent.

STATEMENT OF THE CASE.

Joseph Sieracki, the Respondent herein, was employed as a longshoreman or stevedore by B. H. Sobelman & Co.,

a firm of independent contracting stevedores. Sobelman had a contract to load the Petitioner's vesse' "Robin Sherwood" at Philadelphia.

On December 23, 1942 his employer, Sobelman, assigned Sieracki to operate one of the winches which controlled the 10-ton heavy lift, or jumbo, boom on the ship.

The Petitioner's vessel, "Robin Sherwood", had been built under a contract between the United States Maritime Commission and Bethlehem Steel Company, by the latter company and a sub-contractor, Bethlehem Sparrows Point Shipyard, Inc. When the vessel was completed, and before delivery to the Petitioner, the usual tests required by the Maritime Commission were made and certificates entitled "Certificates of Test of Cargo Handling Gear" were issued over the signatures of representatives of the shipbuilder and the Maritime Commission and delivered with the vessel. The man who was to become Master of the vessel, Captain Bonn, attended as an observer. The vessel was then put in service, but because of the fact that there were two 5-ton booms in addition to the 10-ton heavy lift boom at the same hatch, it had not been necessary to use the heavy lift boom between the date of the tests and the date of the accident here in question. During the intervening months the District Court found, and the Circuit Court of Appeals affirmed the finding, that the gear had been properly cared for.

On December 23, 1942, the stevedores had loaded one piece of cargo weighing approximately 8.2 tons, and were loading a second piece of the same weight when the accident occurred which gave rise to this cause of action. The heavy steel shackle of the topping lift at the peak of the 60-foot boom broke, and the boom fell, injuring the Respondent. He commenced a civil action in the United States District Court for the Eastern District of Pennsylvania against the Petitioner. The Petitioner impleaded Bethlehem Steel Company and Bethlehem Sparrows Point Shipyard, Inc., and filed an Answer denying liability to the

Respondent, but averring that if liability on the part of the Petitioner were shown, it had a right of action over against the two impleaded Defendants. The Respondent herein then filed an Amended Complaint against the impleaded Defendants, and the case proceeded to trial before United States District Judge Kirkpatrick and a jury. At the close of the evidence the amount of the damages was stipulated; the case was withdrawn from the jury, and it was agreed that the Court should determine the questions of liability.

The evidence at the trial clearly supports the finding by the District Judge, affirmed by the Circuit Court of Appeals, that the accident was caused by a defect inside the metal of the shackle. The defect was a flaw in the metal commonly known as a "pipe". This defect was a shrinkage cavity which originated at the time the steel first solidified. The shackle was then forged, galvanized and painted prior to the time the completed ship was delivered to the Petitioner. Its existence was not ascertainable by any external inspection, although the District Judge found as a fact that its presence probably would have been disclosed by X-ray, or by a destructive metallurgical test known as a deep-etch or macro-etch. The District Court found that the Petitioner was not negligent, and this finding was affirmed by the Circuit Court. The District Court held that the Plaintiff-Respondent, a stevedore, was not entitled to a verdict on the mere showing of the defect which constituted unseaworthiness, and was not a "seaman", and could not recover under the general Maritime Law upon a finding of unseaworthiness alone without negligence. The Circuit Court of Appeals reversed this holding of the District Court and held that since the stevedoring work which the Plaintiff was doing at the time of his injury had been done by the members of the ship's crew, he was a "seaman" and entitled to recover on a showing that his injury was caused by unseaworthiness alone, without negligence. The District Court found that the additional Defendants had been negligent and entered judgment against

them, and this was affirmed by the Circuit Court. After the decision of the Circuit Court of Appeals, a Petition for Re-hearing was filed by the Petitioner herein, and denied on June 25th, 1945. This application for a writ of certiorari then followed.

JURISDICTION.

The jurisdiction of this Court to entertain this Petition and to grant the same is provided by Section 347a of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Does a shipowner who is not negligent nevertheless warrant to a stevedore employed by an independent contractor that the appliances of his vessel are completely free from defects?

2. Is a stevedore a seaman and entitled to the same warranty of seaworthiness of the vessel as a member of the crew?

3. Is the warranty of seaworthiness founded upon tort or contract?

4. May the Admiralty doctrine allowing recovery of damages by a seaman as a result of the failure to furnish a seaworthy vessel be applied upon the law side of the District Court in favor of a stevedore?

OPINIONS BELOW.

The opinion of the District Court is reported at 57 Federal Supplement 724, and that of the Circuit Court of Appeals at 149 F. (2d) 98 (Advanced Reports for June 25, 1945).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals is in conflict with decisions on the same question by the Circuit Court of Appeals for the Second, Fifth and Ninth Circuits, and with prior decisions of the Third Circuit, as well as some state court decisions. Some of the decisions have received such inferential approval of this Court as flows from the denial of certiorari.

The Howell, 273 Fed. 513 (C. C. A. 2nd).

DeLuca v. Shepard S. S. Co., Inc., 65 F. (2d) 566 (C. C. A. 2nd); modified by 67 F. (2d) 437.

Jeffries v. DeHart, 102 Fed. 765 (C. C. A. 3rd).

Panama Mail Steamship Co. v. Davis, 79 F. (2d) 430 (C. C. A. 3rd).

Luckenbach S. S. Co., Inc. et al. v. Buzynski, 19 F. (2d) 871 (C. C. A. 5th). Reversed as to the stevedore-employer but not as to ship-owner, 277 U. S. 226, 48 S. Ct. 440.

Jensen v. Bank Line Limited et al., 26 F. (2d) 173 (C. C. A. 9th).

The Mercier, 5 Fed. Supp. 511; affirmed per curiam 72 F. (2d) 1008 (C. C. A. 9th).

Yaconi v. Brady & Gioe, Inc., et al., 246 N. Y. 300, 158 N. E. 876 (Opinion by Cardozo, C. J.). Cert. den. 276 U. S. 636; 48 S. Ct. 421.

The decision of the Circuit Court is clearly contrary to the language and rationale of the Courts in many cases which cannot, however, be said to rule squarely on the point.

Freeman v. A. H. Bull S. S. Co., 125 F. (2d) 774 (C. C. A. 5th).

Skotar v. Lehigh Valley R. Co., 60 F. (2d) 893 (C. C. A. 2nd).

Scheffler v. Moran Towing & Transportation Co., Inc., et al., 68 F. (2d) 11 (C. C. A. 2nd).
The Bolton Castle, 250 Fed. 403 (C. C. A. 1st).
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Cornee v. Baltimore & O. R. Co., 48 F. (2d) 497 (C. C. A. 4th); cert. den. 284 U. S. 621; 52 S. Ct. 9.
The Maharajah, 40 Fed. 784 (Opinion by Judge Addison Brown).

There can be no doubt but that prior to the decision of the Circuit Court of Appeals in the instant case, it had been universally accepted law that the duty owed by a shipowner to a stevedore engaged in loading or unloading cargo on a ship in port but in navigable waters was that of reasonable care. 48 American Jurisprudence, Page 144, §§ 213, 214; 44 A. L. R. 1025; 24 R. C. L. Page 1220, §§ 297, 298 and cases there cited. The decision of the Circuit Court in the case at Bar strikes down the rule of reasonable care and substitutes an absolute warranty irrespective of negligence. The Petitioner has never disputed that it owes a duty of care toward longshoremen and stevedores who come aboard the vessel in port to load and discharge the vessel, but it contends that the so-called "warranty of seaworthiness" extends only to seamen who are actually members of the crew, and arises by reason of the master and servant relationship there existing, and the peculiar status of seamen at sea, which considerations are not present as between the Petitioner and the Respondent.

2. The Circuit Court of Appeals has decided an important question of Maritime Law in a way which is unquestionably at conflict with prior law. 48 American Jurisprudence, Page 144, §§ 213, 214; 44 A. L. R. 1025; 24 R. C. L., Page 1220, §§ 297, 298; Hughes on Admiralty, Second Edition § 104; Robinson on Admiralty, Pages 318, 319; cases cited under point 1, supra.

3. The Circuit Court of Appeals has lifted the definition of the word "seaman" out of its context in *International Stevedoring Co., v. Haverty*, 272 U. S. 50, and applied it to a completely different set of facts. In the *Haverty* case this Court was dealing with a statute and interpreting the meaning of Congress in the use of the word "seaman" in the *Jones Act*, 46 U. S. C. A. 688. It was there held that the word "seaman" included a stevedore. A most unusual situation was there before this Court, which will be discussed hereinafter in the Brief in support of this Petition. Here the meaning of the word must be gleaned from its use in the general Maritime Law, not a specific statute, and the interpretation of the Circuit Court is substantiated neither by reason nor authority.

4. The decision of the Circuit Court has bodily lifted an Admiralty doctrine and applied it in a Civil Action. It thus reached a result which, if allowed to stand, permits a stevedore, without any showing of negligence, to have his case determined and his damages assessed by a jury upon the same basis as if negligence of the most glaring type had been shown. The stevedore is thus given a right which is generally regarded as superior to that given a member of the crew, who must proceed in Admiralty where he rests his right to recover upon unseaworthiness rather than negligence.

5. The decision of the Circuit Court holds a non-negligent shipowner jointly liable with a negligent shipbuilder as if the two were joint tort-feasors, without any determination of primary and secondary liability.

There can be little doubt that the new theory of liability of shipowners promulgated by the Circuit Court of Appeals is one which should be examined by this Court, and a determination made as to whether this new theory is correct or whether the many cases heretofore decided in some of which certiorari has been denied—were incorrectly determined. If the theory is correct, it certainly requires much clarification, and the clarification should come from this Court rather than from the various District and Circuit Courts, because the latter method can only result in greater uncertainty than already exists in Maritime Law. If the doctrine is to stand, only a determination and definition of its scope and limits can make for the uniformity which this Court has always said must be applied to maritime causes of action.

The present case is most appropriate for hearing by this Court, because it is the first case in which this Court has been asked to decide the questions presented. The final decision of these questions is of prime importance to the shipping interests, the stevedores themselves, and the casualty companies which underwrite the liability of stevedoring companies under the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901, et seq. Under present conditions, when the merchant ships of the nation are nearly all owned or operated by the United States Government through the Administrator, War Shipping Administration, this case is of interest and importance to the Government and one which, we respectfully submit, merits the decision of this Court.

Respectfully submitted,

SEAS SHIPPING CO., INC.,
Petitioner.

By JOHN B. SHAW,
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STEVEDORES ARE NOT REGARDED AS SEAMEN IN THE GENERAL MARITIME LAW.

The law on the subject of the responsibility of a shipowner to a stevedore as it existed in some of the Circuits prior to the decision below may be summarized by the following quotations:

"The ship is not an insurer of its appliances nor of the invitees who may operate the gear. It is bound, however, to furnish suitable tackle and machinery, *reasonably safe*, and strong for the work at hand . . . *A secret defect in such gear, even though effecting casualty, will not fasten responsibility upon the vessel or her owners.*" (Italics ours.) *The Mercier, supra* (C. C. A. 9th), 5 Fed. Supp. 511; affirmed per curiam 72 F. (2d) 1008.

"As libelant was an employee of an independent contractor, the relationship of master and servant did not exist between him and the steamship company. However, *it owed him the duty of using reasonable care to furnish him with reasonably safe appliances to work with*, suitable to the work being done, and of inspecting these appliances before turning them over to the contracting company." (Italics ours.) *Luckenbach S. S. Co., Inc., et al. v. Bazynski, supra* (C. C. A. 5th), 19 F. (2d) 871.

"Libelant not being a member of the crew, no question of seaman's rights or contracts arises, under The Osceola, supra. *He must recover on principles of negligence.*" (Italics ours.) *The Howell, supra* (C. C. A. 2nd), 273 Fed. 513.

"The necessary condition of the defendant's liability is that *he owed* to Jeffries *a duty of care*, in violation whereof he negligently committed or omitted some act, and thereby proximately caused the fatal catastrophe." (Italics ours.) *Jeffries v. DeHart*, *supra* (C. C. A. 3rd), 102 Fed. 765.

The decision of the Circuit Court of Appeals affirmed so much of the decision of the Learned Judge of the District Court as held that the Petitioner was free from negligence, and had used all care reasonably required of it. The question of negligence, therefore, is no longer in the case although that was clearly the theory upon which the case was tried. The Circuit Court of Appeals held that, regardless of negligence, the so-called "warranty of seaworthiness" applied. That warranty has been held to apply to a seaman who was a member of the crew of the vessel, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; 64 S. Ct. 455; *The H. A. Scandrett*, 87 F. (2d) 708 (C. C. A. 2nd), and to entitle him to maintain an action in Admiralty to recover damages for an injury caused by the failure of the shipowner to furnish a seaworthy vessel. In such a case it is not necessary that negligence be proven. The obstacle which the Circuit Court had to overcome was the line of decisions heretofore cited which held that negligence was the only basis upon which a stevedore could predicate recovery against a shipowner. Therefore, said the Circuit Court, a stevedore is a seaman insofar as is necessary to enable him to recover in this particular case. The holding is based upon the result reached by the Court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50; 47 S. Ct. 19.

In writing the opinion of the Court in that case, Mr. Justice Holmes said:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible . . . We cannot believe that Congress willingly would have allowed the protection to

men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

That decision was handed down on October 18, 1926. Less than six months thereafter, on March 4, 1927, Congress did the very thing which Mr. Justice Holmes, for the Court, had stated he could not believe Congress would allow. It made mandatory the variation of the protection afforded depending upon the fortuitous circumstances of the man's employment by a stevedore or by the ship. This it accomplished by enacting the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq. See Robinson on Admiralty, pp. 318, 319; Stanley Morrison, "*Workmen's Compensation and Maritime Law*", 38 Yale Law Journal 472.

The Court in the *Haverty* case recognized that, under the general Maritime Law, a stevedore was not a seaman and all that the decision stands for, is that under a particular statute, the Court believed that Congress intended to include stevedores when it used the term "seamen".

In the *Haverty* case, this Court was dealing with an unusual situation. Stevedores and longshoremen had first received compensation in accordance with the Workmen's Compensation statute of the particular state in which they worked. In *Southern Pacific Co. v. Jensen*, 244 U. S. 205; 37 S. Ct. 524, this Court struck down an award of compensation under the New York Statute, and held that it was beyond the power of the state to so regulate a maritime occupation. Congress then passed an amendment to § 24 of the Judicial Code, enacted October 6, 1917, C. 97, 40 Stat. 395. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; 40 S. Ct. 438, this Court held that such an enactment was beyond the power of Congress. The Act was again amended by the Act of June 10, 1922, C. 216, 42 Stat. 634. In the *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 219; 44 S. Ct. 302, the Amendment was held unconstitutional. It will thus be seen that when the case of *International Stevedoring*

doring Co. v. Haverty came before this Court, stevedores and longshoremen were completely without redress for injuries received in the course of their employment except under such circumstances as the Maritime Law provided for an action based upon negligence. In 1920, Congress had passed the Merchant Marine Act, which included within it the Jones Act, *supra*, which gave to seamen the same rights which Congress had previously granted to employees of railroads engaged in interstate commerce. A study of the record in the *Haverty* case shows that the idea that perhaps stevedores could be construed to be seamen within the Congressional intent of the Jones Act, originated in the opinion of the Chief Justice of the Supreme Court of the State of Washington. He merely raised the point as an interesting one, but held himself bound by prior decisions to the contrary. It must be remembered that these prior decisions had been under the general Maritime Law, and uniformly held that there was a distinction between a seaman who signed Shipping Articles and sailed on a voyage, and a longshoreman whose only connection with the vessel was to load or unload it while in port. The Briefs of counsel before this Court in the *Haverty* case show that the possibility that Haverty might be construed to be a seaman under the Jones Act was not seriously considered, and is only referred to briefly and without forceful argument in the Brief of the respondent, Haverty. The Petition for Re-hearing in the *Haverty* case indicates the question first arose seriously during the oral argument before this Court. The *Haverty* case was decided on October 18, 1926.

We shall now refer to the question of whether or not the *Haverty* decision construing a stevedore to be a seaman within the meaning of the Jones Act properly reflected the intention of Congress. The Merchant Marine Act of 1920, of which the Jones Act is a section, expressly referred to both stevedores and seamen: In § 30 of the Act, stevedores are twice mentioned in express terms with reference to liens. We do not believe that such a loose use of words can

be attributed to Congress in enacting legislation, and if stevedores had been intended to be included within the Jones Act, Congress would undoubtedly have mentioned them specifically. Our views in this regard are supported by later reports of the Judiciary Committees of the House of Representatives and the Senate. The House Report, No. 639, Second Session, 67th Congress, dated January 31, 1922, clearly indicates that the Judiciary Committee believed that longshoremen and stevedores were a class apart from the seamen who had been given the benefit of the Jones Act. The Report states, "Economically, port workmen and seamen are distinct". The Report of the Judiciary Committee of the Senate on the same bill is even more enlightening. It is Report No. 94, 67th Congress, First Session, and is dated June 6, 1921. The Report was presented by the late Senator Borah. The Report, in part, reads as follows:

> "*There is a clear distinction between the two classes, seamen and landsmen who work in or about ships,* who were confused in the Johnson Amendment and in the situation which arose in the Jensen case. The distinctions are based upon the facts of their employment, upon the separate systems of law which have hitherto been applied to them, and the character of employers which, in the case of seamen, are ships and shipowners, and in the case of landsmen, in the main, independent local contractors." (Italics ours.)
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> "The rights of a seaman when injured in the course of his employment are governed not by the common-law of torts but by a special set of rules which are based upon the difference in the conditions of his employment and those of ordinary land workers. A seaman is entitled to maintenance, care, and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. When he reaches port the U. S. Marine Hospital is open to him without expense on his part until

he is cured of his illness or injury. This form of compensation for accidents or illnesses incurred by a seaman is of great antiquity; it marks him off very clearly from the landsman who works on ships in port. The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. (Schuede v. Zenith S. S. Co., 216 Fed. 566, 570). *"The special treatment which seamen have always had under the Acts of Congress was recently emphasized by the provision in the Merchant Marine Act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.*

The employer in the case of a seaman is always the owner or charterer of a ship and he has the use of the peculiar remedies of the admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.

Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards. They do not in all cases form a special class always employed in this work. The peculiar maritime law, applying to seamen, is inapplicable to their condition and no attempt has been made to apply it to them. They do not share in the advantages of the United States Marine Hospital, nor are their employers under any obligation to care for them in case of accident." (Italics ours.)

These two reports were made in connection with legislation intended to bring stevedores and longshoremen

within the protection of the workmen's compensation statutes of the various states. They were made after the passage of the Jones Act, and before the decision of this Court in the *Haverty* case.

The *Haverty* decision concerned only the Court's interpretation of the Jones Act, and must be strictly limited, therefore, to actions brought under that Act *by a stevedore against his employer.* The Jones Act governs only liabilities between employee and employer. For all practical purposes, therefore, the effect of the *Haverty* decision was nullified by the passage of the Longshoremen's and Harbor Workers' Compensation Act, which substituted the exclusive remedy of statutory compensation for all other liability whatsoever, as between a stevedore employer and his employee injured on navigable waters. *Cf. Swanson v. Marra Bros., Inc.*, 57 Fed. Supp. 456; affirmed per curiam 149 F. (2d) 646.

In the instant case, the Jones Act is not involved, since the action is not brought by a stevedore against his employer. This is a suit by a stevedore against "third parties", to wit, a shipowner and the builders of the ship, none of whom was his employer. Sequitur that the *Haverty* decision is not controlling. The decision in the *Haverty* case simply held that, in passing the Jones Act, Congress *intended* that the term seamen as used in that Act should include stevedores. No interpretation of the intent of Congress is involved in the instant case. The Circuit Court, however, has borrowed not the reasoning, but *the result* of the reasoning in the *Haverty* case, and has applied it to upset a long established principle of general Maritime Law. It has held that the warranty of seaworthiness, hitherto available only to a seaman against his ship or employer in an Admiralty action, is now available to a stevedore in a Civil Action against third parties, none of whom was his employer.

There are many clear and well-defined distinctions between a seaman in the ordinary sense of the word, and a

stevedore. The Report of the Senate Committee referred to above sets forth some of them. A seaman is essentially a migratory worker, whereas the stevedore is not. A seaman is entitled to the benefits of the United States Marine Hospitals, and a stevedore is not. Stevedores are not certificated by the Department of Commerce as seaman must be. Stevedores receive time and one-half for work in excess of 40 hours per week whereas "seamen" are exempt from this provision of the Fair Labor Standards Act, 29 U. S. C. A. 213, and the regulations thereunder. They are members of different unions for the purposes of collective bargaining.

In *Mahnich v. Southern S. S. Co., supra*, Mr. Chief Justice Stone stated,

> "But the admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in The Osceola, 189 U. S. 158; 23 S. Ct. 483. (Citing cases.) The latter rule seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out, and was generally applied, before its statement in The Osceola, supra, by numerous decisions of the lower federal courts during the last century. See The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707.
>
> This was a recognized departure from the rule of the English law, which allowed no recovery other than maintenance and cure for injuries caused by unseaworthiness, Couch v. Steel, 3 El. & Bl. 402, until the enactment of the Merchant Shipping Act of 1876, . . . reenacted by the Merchant Shipping Act of 1894 . . . By that statute there is annexed to every contract of service between the owner of a ship or the master and any seaman thereof an obligation that all reasonable means be used to insure the seaworthiness of the ship before and during the voyage."

It will thus be seen that not only is there a distinct difference between a stevedore and a member of the crew who actually goes out to sea with the vessel, but by reference to *The Osceola, supra*, and the language of Chief Justice Stone above quoted, the doctrine of the warranty that a shipowner will furnish to his seamen a seaworthy vessel is one which arises out of the peculiar circumstances of his employment, entirely different from the employment of a stevedore.

The Maritime Law, it will thus be seen, clearly recognized the distinction between a seaman and a stevedore prior to the decision in *International Stevedoring Co. v. Haverty*. That decision has been criticized as unreal, 38 *Yale Law Journal* 472, *supra*; 27 *Columbia Law Review* 211; *Robinson on Admiralty, supra*. As is said by Stanley Morrison,[1] in "Workmen's Compensation and the Maritime Law", *supra*,

> "The Supreme Court has lost sight of realities with regard to longshoremen and harbor workers."

See also 16 *Boston University Law Review* 308.

THE WARRANTY OF SEAWORTHINESS IS FOUNDED UPON A CONTRACT RELATIONSHIP.

The decision of the Circuit Court of Appeals in the instant case loses sight of the fact that the origin of the doctrine of liability to a seaman by reason of furnishing an unseaworthy vessel or appliances was really one incorporated in the contract of employment, and hitherto applied only when the relationship of master and servant existed.

The Circuit Court admits that, if the warranty depends upon contract, it cannot apply to this case. But, says the Court, the term "warranty" is not intended to indicate a reason for the resultant liability, but rather is a term used

[1] A Stanley Morrison was law clerk to Mr. Justice Holmes in 1919-1920. See *Bowen, Yankee From Olympus*, Appendix, p. 455.

to describe a resulting legal liability, in the nature of an insurer's liability which is rooted in the Admiralty law. But it is rooted only where there is a contract of a special nature between the parties, be it a contract for the carriage of goods, a contract of employment or a contract for the chartering of a vessel. Maritime torts and maritime contracts are the classical examples of Admiralty jurisdiction. The decision of this Court in *The Osceola, supra*, is the very foundation of the American doctrine, yet that decision can be reconciled with the decisions which preceded and followed it only on the basis that the warranty had its foundation in contract. Here there is no tort unless there can be read into the general Maritime Law, untouched by statutes such as the Jones Act, an insurer's liability, one where, in the old common-law sense of the word, there has been no tort because there has been no negligence.

That the master and servant, or employer and employee, relationship is a sufficient and distinct ground for changing the relationships which ordinarily exist between persons is so clear as not to require the citation of authority to this Court. The shipowner is not the employer of the Respondent in this case, and he is not the employer of the numerous classes of workmen who may come on board his ship while it is in port, such as welders, radio repairmen and the like. Cf. Dissenting opinion of Mr. Justice Brandeis, in *State of Washington v. W. C. Dawson & Co., supra*. He must have them in order to do the repairs and maintenance necessary by reason of the high duty imposed upon him to furnish a vessel seaworthy in all respects for its intended voyage. The same reasons which make the rule desirable as to a member of the crew who, once having joined, must obey all lawful commands and is subject to penalties if he leaves the employment without authority, do not apply to these port workmen who live ashore, work by the hour or the day, do not put out to sea, are not subject to the orders of the officers, and who may walk ashore without hindrance whenever they choose.

One cannot examine the language of the Court in *The Osecola, supra*, without reaching the conclusion that when the Court held that the vessel and her owner are "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship", the word "seamen" was used interchangeably in the same case with the term "members of the crew", and was intended to apply to those employed by the owner in that capacity.

The Circuit Court of Appeals reasons that because the work of loading and unloading ships was once, long ago, done by members of the crew, the fact that it is now done by a distinct class of workers is not enough to change the ancient rights. The statement that the work done by stevedores was once performed by members of the crew appears to have first been made in a decision by Judge Benedict, *The Circassian*, 1 Ben. 209. We have little doubt as to its accuracy, but our research into the American law discloses that the work of loading and unloading cargo in the United States has always been done, in whole or in part, by a group of land workers who have been known by different names from time to time. Some early cases referred to them as "roustabouts". Cf. *Liability for Injury to Roustabouts*, 54 Central Law Journal 264. Other cases call them "freighters", "landsmen" and "workmen coming on board"; *The Ole Oleson*, 20 Fed. 384; *The Max Morris*, 24 Fed. 860; 137 U. S. 1; *Hughes on Admiralty, supra*, § 103. Regardless of whether or not the work was once done by members of the crew, times change. The reason for the rule ceases when the conditions which gave rise to it originally have been dissipated by the inexorable march of progress. Medical attention was once furnished by barbers, but that is no reason for calling the barber of today a physician.

There are a number of cases which recognize that the duty to furnish a seaworthy vessel relates to the time of sailing or "breaking ground": *Globe S. S. Co. v. Moss*, 245 Fed. 54; *The Josephine*, 49 F. (2d) 207; *The Fort*

Gaines, 21 F. (2d) 863; *Cullen Fuel Co., Inc. v. W. E. Hedger, Inc.*, 290 U. S. 82; 54 S. Ct. 10; *Warranty of Seaworthiness*, 48 Solicitor's Law Journal 81. Any other interpretation would obviously make it impossible of compliance by the shipowner. Nothing as large as a ship and her machinery could possibly be absolutely perfect at all times; maintenance and repair are obviously necessary and, of necessity, are largely performed in port. Under the doctrine of the decision of the Circuit Court, it has been argued that the Court must direct a verdict (binding instructions on the question of liability) in favor of a stevedore injured while clearing away the wreckage of a boom which had broken while being used by his fellow employees, on the ground that even under such circumstances there was an absolute duty upon the shipowner to furnish a seaworthy vessel which amounted to an insurer's liability.[2]

Thus far, we have not referred to recent decisions of this Court which have recognized the distinction between members of the crew of a vessel and stevedores. The problems before the Court in *South Chicago Coal & Dock Co. et al. v. Bassett*, 309 U. S. 251; 60 S. Ct. 544, and *Norton v. Warner Co.*, 321 U. S. 565; 64 S. Ct. 747, were similar to that in the case at Bar in that each required a distinction to be made between the two based upon the general maritime law, although it is true that the question, once decided, determined whether or not the particular person came within the scope of an Act of Congress. In the *Bassett* case this Court, referring to stevedores, said:

> "They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation."

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[2] *Bruszewski v. Isthmian Steamship Company*, U. S. D. C., E. D. Pa., Civil Action No. 3632.

The distinction there drawn is, we submit, equally valid here. As was said by Mr. Justice Cardozo when he was Chief Justice of the New York Court of Appeals, in *Yaconi v. Brady & Gioe, Inc., et al.*, 246 N. Y. 300; 158 N. E. 876, when the same argument was made as was here accepted by the Circuit Court of Appeals,

> "A stevedore however styled under the Jones Act is not a seaman under the rule of general maritime law with its special exemption to those subject to the power of a master . . . Such a laborer is subject to the general maritime law, but not to the distinctive features of that law which applied to seamen and no others."

That language by Mr. Justice Cardozo, who cited the *Haverty* case in his opinion, was before this Court upon petition for writ of certiorari. The Court which there denied the petition, 276 U. S. 636; 48 S. Ct. 421, was exactly the same Court which one year before had decided the *Haverty* case. The decision in the instant case accepts the theory which Mr. Justice Cardozo rejected, and the holdings are flatly contradictory.

ENFORCING AN ADMIRALTY DOCTRINE ON THE LAW SIDE OF THE COURT.

The doctrine of seaworthiness was originally known only in Admiralty; it was not and is not a common-law doctrine. Prior to the Jones Act, although a member of the crew had certain rights "saved" to him to proceed in the common-law Courts, 28 U. S. C. A. 41, his right to recover an indemnity over and above wages, maintenance and cure was dependent upon a showing of unseaworthiness.

As is said by Frederic Cunningham in 18 *Harvard Law Review* 294,

> "It surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the Courts undertaking to admin-

ister it, or there will be no certainty in the law, . . . *It will not do for a common law court to proceed in accordance with the Admiralty law, nor for an Admiralty Court to proceed in accordance with the common law.* The fact that in the United States the judges who exercise the Admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate." (Italics ours.)

If the decision of the Circuit Court is correct, a stevedore can obtain a jury trial in the District Court and recover upon the basis of unseaworthiness without a showing of negligence, whereas a member of the crew, to obtain a jury trial in the same Court, must prove negligence.

We respectfully submit that this case is of sufficient importance, and the doctrine announced so at variance with prior holdings as to warrant this Court's granting the Petition and issuing the Writ of Certiorari.

Respectfully submitted,

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